IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 723

UNITED STATES OF AMERICA,
Appellant,

against

MASONITE CORPORATION, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE FLINTKOTE COMPANY, APPELLEE

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Statement

This is a direct appeal to this Court by the United States from a final judgment of the District Court for the Southern District of New York, entered September 27, 1941 (R. 884), dismissing the plaintiff's complaint on the merits. The opinion of the District Court (R. 843-853) is reported in 40 Fed. Supp. 852.

The Statutes involved, the facts shown by the Record, and the issues upon this appeal, are set forth in the brief submitted by counsel for the Appellee Masonite Corporation. On behalf of the Appellee The Flintkote Company, we respectfully join in and urge the arguments and conclusions, upon the facts and the law, which that brief presents.

Except for such facts as the identity and character of the business conducted by Flintkote, and that it entered into an agency agreement with Masonite in 1937, the entire evidence as to Flintkote's relations with Masonite and its sales of Masonite hardboard consists in the stipulation, and related exhibits, as to the testimony which would be given by its President, I. J. Harvey, Jr.,[1] were he called to the stand and questioned (R. 713-24). Since this stipulation was entered into to expedite the trial at the suggestion of the attorneys for the Appellant, who expressly agreed to the competency of the evidence, and in this manner waived cross examination and confrontation of the witness, and in view of the findings of fact made by the Trier of the facts, this evidence must be accepted as establishing the facts relating to the alleged cause of action against Flintkote.

The Appellant's principal attack is levelled at events occurring, and agreements made between Masonite and the other Appellees,[2] in the period between 1926 and 1936. Flintkote first became an agent of Masonite on March 16, 1937, under a different form of agency agreement, ignorant of the terms of the agreement between Masonite and the other Appellees, and under the conviction that in no other way could it make its competition with the other Appellees effective in the insulation board market (R. 715-7).

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[1] Another Mr. Harvey, Harold C. Harvey, was President of the Agasote Millboard Company referred to in the evidence.

[2] Except the Appellee Dant & Russell, which later signed the same form of agency agreement as that prepared by Masonite for its agreement with Flintkote.

Summary of Argument

The briefs for the other Appellees show that at no time was there any conspiracy among them which Flintkote could, on March 16, 1937, have joined. We shall here show, —in order to present the case for this Appellee fully,— that even if there had been any such conspiracy as the plaintiff claims (which there was not), the conduct of Flintkote as shown by the Record would not have constituted a joining of such a conspiracy. Flintkote became an agent of Masonite in good faith and for legitimate and competitive reasons alone.

Typically, for the year 1940 Flintkote's net profit from the operation of selling Masonite hardboard was approximately 4% of its net dollar sales of this product, as compared with a net profit from all of its sales of approximately 8% (R. 723). During the four years of its agency, Flintkote's sales of Masonite hardboard varied between .0039 per cent. and .0094 per cent. of its sales of all products (R. 713). But in the same period Flintkote has spent its money and efforts out of all proportion to those sales and compensations in a vigorous effort to find, manufacture, and market a competitive substitute for Masonite hardboard, and this endeavor continues unabated (R. 720-2).

There is not a shred of evidence in the record of antecedent wrongdoing or bad faith to taint the new agency agreement between Flintkote and Masonite of March 20, 1941, entered into by Flintkote in good faith, openly, and without reference to the intentions or desires of any of the other Appellees.

Under no conceivable view of this case, therefore, would an injunction justifiably issue against The Flintkote Company, and the judgment dismissing the complaint should be, as to it, affirmed.

POINT I

Even if it were assumed that an unlawful conspiracy existed between Masonite and any of the other Appellees, the uncontradicted evidence shows that Flintkote's becoming an agent in March, 1937, could not have constituted a joining or entering into such conspiracy.

Flintkote is, by the fundamental character of its business, a manufacturer (R. 714). In 1930 it entered upon a policy of expanding and diversifying its sales line (R. 712), and early in 1931 began to investigate and consider the addition to its products of insulation board, for the following reasons stated in the stipulated testimony of I. J. Harvey, Jr. (R. 713):

> "(1) it was a material handled by the class of trade to which Flintkote sold roofing materials, (2) it was a relatively new material in the building industry and it appeared to me that the variety of its uses in building work would continue to expand, (3) it could be manufactured of a number of different types of fibrous material and appeared to me to offer attractive possibilities for competition on the basis of distinctive quality, character, and appearance, and (4) it was my judgment that public acceptance of the product was increasing and that there would be an eventual much greater demand for volume."

From 1934 to 1940 Flintkote distributed insulation board, both by purchase and resale and by agency. Using this period for study and experimentation Flintkote, at an investment of $2,000,000, constructed its own "expandable" mill for the manufacture of insulation board. The mill has a present capacity of 100,000,000 feet of board per annum. (R. 714).

"I and the other officers and directors of Flintkote," the stipulated testimony of I. J. Harvey, Jr., states (R. 714), "have always regarded the fundamental character of the Company's business as being that of manufacture. We have frequently, at meetings of the Board of Directors and at staff meetings, reiterated our policy to preserve the Company's character as such and not to undertake the distribution of products manufactured by others on any extended scale. Any such distribution is viewed by the officers and directors of Flintkote as purely incidental, or as experimental with the view to dropping the product if it is not successful or of entering upon the manufacture of it if trial and experience show it to be successful."

In its study of the insulation board market, Flintkote came to the conclusion that, in order to be able to compete with other distributors of insulation board who distributed Masonite hardboard as well, it was necessary for Flintkote to be able to offer its customers either the Masonite hardboard or some directly competitive substitute (R. 715). The reasons for that conclusion, referred to in Mr. Harvey's stipulated testimony (R. 723), are shown in the evidence summarized in the briefs of other Appellees.

After patent investigation and research, Flintkote became convinced that the Masonite patents "were not only valid but also basic," and that there was no possible method for manufacturing a non-infringing board which would be directly competitive with the Masonite hardboard or which "could be offered for substantially all the uses in which Masonite hardboard can be employed, or which could be manufactured at a cost to compete with Masonite's low production costs". (R. 715-6)

Flintkote approached Masonite "to obtain hardboard on any practicable terms." Flintkote was not solicited by

Masonite, and indeed its request for hardboard was at first refused. Flintkote accepted the terms which Masonite was willing to offer, and on March 16, 1937 signed an agency agreement. (R. 716-7)

Masonite prepared a new draft of agency agreement for Flintkote to sign (R. 717; Ex. S-46, R. 351-84). It was not the standard form of agreement which had been entered into with other Appellees in 1936 (Ex. S-44, R. 268-316). Among numerous differences were: that Masonite, instead of being bound to the agreement for the duration of the patents, had the right to cancel on six months' notice, and also at its option if Flintkote should engage in distributing a competing product; that Flintkote was not, as the other Appellees had been, granted an option for a manufacturing license; and that Masonite did not agree that Flintkote should have the benefit of more favorable terms granted to any other person appointed as *del credere* agent.

But the fact that there were these differences is not urged as important. What is significant as sustaining the findings of the Trial Court with respect to this Appellee, is that Flintkote did not, when it entered into it, know how this agreement compared with the agreements had by other national distributors.[3] Flintkote knew, of course, that the other Appellees were selling Masonite hardboard as agents for Masonite and therefore at Masonite's prices. But not until this action was commenced did Flintkote see or become acquainted with the terms of any of the other agency agreements. (R. 717)

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[3] Before signing its agreement, Flintkote, interested in knowing whether it had been granted competitively favorable compensation, inquired of Masonite as to what differences there were between its agreement and other agreements. There was no reply to this inquiry, but Flintkote nevertheless executed the agreement. Thereafter a reply was made by Masonite of a general nature to to the effect that Flintkote had been granted substantially as favorable selling terms and compensation as the other agents. (R. 717)

A defendant, though by the circumstances of his affairs connected with the operation of others' plans, cannot be held to have joined or entered into a conspiracy to violate the anti-trust laws, unless it is shown that he knew that there was a conspiracy and had knowledge of its objects.

United Mine Workers v. *Coronado Coal Co.*, 259 U. S. 344 (1922);

Virtue v. *Creamery Package Mfg. Co.*, 227 U. S. 8 (1913);

Jayne v. *Loder*, 149 Fed. 21 (C. C. A. 3d, 1906);

"The question is did he join the others with a knowledge of the purposes and objects of the conspiracy."—*United States* v. *Anderson*, 101 F. (2d) 325, 332 (C. C. A. 7th, 1939), cert. den. 307 U. S. 625.

Cf.: *United States* v. *Falcone*, 109 F. (2d) 579 (C. C. A. 2d, 1940);

"Unless the scheme, or some proposed scheme, is in fact consented to or concurred in by the parties in some manner, so that their minds met for the accomplishment of the proposed unlawful act, there is no conspiracy. . . . To constitute a conspiracy, the evidence must show an intentional participation in the attempt to commit the offense."—*Lucadamo* v. *United States*, 280 Fed. 653, 657 (C. C. A. 2d, 1922).

In the case at bar there is not only a failure of proof of any unlawful plan or scheme among other Appellees, and a failure of proof of any intent on the part of Flintkote to join or promote any general plan or scheme, but the proof is positive that Flintkote entered into its agency agreement in 1937 without reference to, and in ignorance and disregard of, whatever might have been the arrangements between Masonite and others.

The stipulated and uncontradicted evidence is that there have been no agreements, understandings or arrangements between Flintkote and Masonite other than as expressly set forth in their agreements of March 16, 1937 (Ex. S-46, R. 351-84) and March 20, 1941 (Ex. S-51, R. 407-16), no discussion between them of the prices which Masonite should fix for hardboard, and no arrangements between Flintkote and any other person as to the prices at which either hardboard or insulation board should be sold. (R. 720)

See Findings 17 (last sentence), 20, 21, 22, 25, 28, 31, 32 and 33 (R. 876, 877, 878, 879, 880, 881).

POINT II

Flintkote's Agency for Masonite did not and does not have the effect, or tend to have the effect, of preventing, suppressing, hampering or even discouraging competitive manufacture and sale by Flintkote of any lawfully competitive substitute for Masonite hardboard.

It is the stipulated and uncontroverted testimony of I. J. Harvey, Jr., that

> "The spirit, purpose and intent with which I approached the subject of hardboard when it became apparent to my organization that the handling of hardboard would be necessary in order to make a success of insulation board, was to consider this product for manufacture by Flintkote" (R. 720-1).

Upon discovering that hardboard was necessary to the successful promotion of insulation board sales, Flintkote immediately undertook patent study and research. The

signing of the Masonite agency agreement on March 16, 1937 was not the occasion for ceasing or diminishing those efforts.

> "On the contrary our efforts were accelerated and intensified, as the experience with selling Masonite hardboard has increased my interest in getting the Flintkote Company into the production of a similar material" (R. 721).

That a continuous major effort has been and is now going on to find a non-infringing hardboard-like product and that numerous possibilities have been thoroughly investigated, and abandoned only when found either infringing, inferior, or impractical by any sound business standard, is borne out by the Record in detail.

While Flintkote has spent over $30,000 in research of hardboard-like products (R. 721), at the same time Flintkote's net profit from selling hardboard in the year of its largest volume of sale, was less than $7,000 before taxes (R. 723 and Ex. FL-4 omitted from printing). Thus in the four years of its agency for Masonite, Flintkote appears to have earned less from selling Masonite hardboard than it has spent in trying to find a substitute to manufacture and sell.

Since 1936 Flintkote has investigated, among other things, a process covered by the foreign "Basler Board" patents; a process, for which a pilot plant was put into operation at Sharon, Pennsylvania, for making a hardboard-like product out of spent pickle liquor from steel mill operations; a process called "Microcel" for making a hardboard-like product from wood fibre, cement and newsprint; a process for compressing wood fibre, sawdust, skimmed milk and formaldehyde; a process for compressing rag felt

saturated with resins; and a process for compressing insulation board saturated with terpin hydrate. (R. 721-2)

The facts thus negate the speculative suggestion of the plaintiff, that becoming a Masonite agent might have stifled potential manufacturing competition by Flintkote. See Findings 39 and 43 (R. 882, 883). Nothing in the record contradicts or impugns the evidence as to the persisting intention of Flintkote in this respect:

> "My desire with respect to hardboard in the past has been to obtain a supply as an adjunct to sales of insulation board on any practicable terms, and at the best rate of compensation which Masonite would be willing to allow; my only intention as to the future is to perform the agreement of March 20, 1941 in accordance with its terms and to have Flintkote, which is essentially and fundamentally a manufacturing concern, go into the manufacture of a hardboard type of product at its Meridian, Mississippi plant as soon as it becomes commercially and lawfully feasible to do so" (R. 720).

Nothing in the agreement of March 20, 1941 will hamper Flintkote in entering competitive manufacture. The agreement is freely cancellable by Flintkote on six months' notice, surely a minimum period for the organization of manufacturing and distributing facilities for the promotion of any new product of such character which Flintkote may succeed in developing.

POINT III

Under any conceivable view of the facts in other respects, therefore, the judgment dismissing the complaint should be, as to The Flintkote Company, affirmed.

Addressing our brief, for fullness of presentation, to the contingency of the issuance of an injunction in this action, we respectfully submit that the Record would show no justification for extending the scope of the injunction to run against Flintkote.

There is no existing or persisting arrangement, agreement, conduct, threat, or even state of mind, on the part of Flintkote, for an injunction to operate against, except Flintkote's agency agreement of March 20, 1941. That agreement is a proper and typical *del credere* agency agreement, which meets every less than fantastic suggestion of Appellant's counsel as to what an agency agreement should preferably provide.

Flintkote's 1937 agreement also was, as is shown in Masonite's brief, a valid and typical agency agreement. But even if the law of agency were otherwise and the 1937 agreement not an agency agreement, that would not justify a reversal of the judgment as to Flintkote. The Record shows that the officers of Flintkote believed its status to be nothing but that of an agent and that price dictation by Masonite as patentee was lawful. And since the Record clearly shows that Flintkote did not enter into the 1937 agreement with any motives or intentions offensive to the purpose and spirit of the Sherman Act, the fact that the 1937 agreement has been cancelled and superseded (R. 719) makes the issue, as to Flintkote, moot. This is an *a fortiori* conclusion from the following decisions of this Court:

Bracken v. *Securities and Exchange Commission*, 299 U. S. 504 (1936);
Brownlow v. *Schwartz*, 261 U. S. 216 (1923);
Commercial Cable Co. v. *Burleson*, 250 U. S. 360, 362 (1919);
Lewis Publishing Co. v. *Wyman*, 228 U. S. 610 (1913);
California v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314 (1893).

Flintkote's execution of its 1941 agreement was not conditional upon the execution of a similar agreement by any of the other defendants, and the continued performance of that agreement by both Flintkote and Masonite is not conditioned upon anything outside its terms (R. 719-20).

Since Flintkote's 1941 agreement is a valid agency agreement,—and, when judged by its independent effects, certainly can not be found inimical to the public interest,—it could at most be deemed a collateral incident of any conspiracy which might be thought to exist among others. Under such circumstances it should not be struck down.

Virtue v. *Creamery Package Mfg. Co.*, 227 U. S. 8 (1913);
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902);
A. B. Small Co. v. *Lamborne & Co.*, 267 U. S. 248 (1935);
United States v. *American Tobacco Co.*, 221 U. S. 106, 185 (1910);
Sinclair Refining Co. v. *Wilson Gas & Oil Co.*, 52 F. (2d) 974 (W. D. S. C., 1931).

In *A. B. Small Co.* v. *Lamborne & Co.*, 267 U. S. 248 (1925), this Court held valid and enforcible between the

parties a contract for sale of refined sugar, notwithstanding that the seller had entered into the contract as part of a plan and scheme to manipulate interstate trade in refined sugar "and that the seller conformed the terms of sale to standards sanctioned by the combination" (p. 252).

The language of Judge PETERS in *Gasoline Products Co. v. Champlain Refining Co.*, 46 F. (2d) 511, 514 (D. C. Me., 1931) deals with an apt analogy:

> "The defendant is not a party to the cross license agreements and I can see no vision in the argument that the mere purchase of a sub-license from the alleged illegal combination makes the purchaser a party to it. The contract in suit is complete in itself, involves the doing of nothing illegal and is enforcible without reference to any other agreement. I fail to see how there can be any illegality 'inherent' in one contract when it is necessary to go wholly outside of it and into another contract [to which the defendant is not a party][4] to find illegality."

But, lastly, even if there were justification (which there is not) for enjoining Masonite Corporation from performing any of its agency agreements, this would not justify reversing the judgment as against Flintkote on the ground alone that it is the other party to one of these enjoined agreements.

> "The fact that the suit was brought under the Sherman Act does not change the principles which govern the granting of equitable relief."—*Appalachian Coal Co. v. United States*, 288 U. S. 344, 377 (1933).
>
> *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8 (1913);
>
> *United States v. E. I. DuPont deNemours & Co.*, 188 Fed. 127, 129 (C. C. D. Del. 1911).

[4] Our insertion.

It would be a gross inequity, upon the facts shown in this Record, to cast upon The Flintkote Company the burden and obloquy of an adverse judgment in this action.

Conclusion

It is respectfully submitted that the agreement of March 20, 1941 between The Flintkote Company and Masonite Corporation has correctly been adjudged not to violate the Sherman Act.

Flintkote, as the owner of a 100,000,000-foot insulation board mill, is vitally concerned, not in being an agent for Masonite, but in being able to sell hardboard. Should its agency agreement be struck down, and should Masonite be unwilling to do business with Flintkote on any basis other than this agency basis, the result would be to cripple the effectiveness of Flintkote's competition in the insulation board market, and to build up in Masonite Corporation a monopoly, not only of hardboard under its adjudicated patents, but of insulation board as well.

In any event and under any possible view of this case in other respects, it is respectfully submitted, the judgment dismissing the complaint herein should be, as to The Flintkote Company, affirmed.

Respectfully submitted,

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April 1942